109 (1)
Supreme Court, U.S.
FILED
No. 08-560 OCT 24 2008
OFFICE OF THE CLERK

In the
Supreme Court of the United States

ALLIANCE SECURITY PRODUCTS, INC. and
ALLIANCE SECURITY INTERNATIONAL, LLC,

Petitioners,

- v. -

FLEMING AND COMPANY, PHARMACEUTICALS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This case raises an important federal issue regarding when a federal court should grant summary judgment under Federal Rule 56 of the Federal Rules of Civil Procedure, an issue not addressed by this Court since 1986. In this case, the courts below granted and affirmed summary judgment in favor of respondent on the basis that the valuable idea for a new drug product confidentially shared with respondent was not sufficiently novel, despite the fact that the federal government (the FDA) awarded the drug Orphan Drug status under 21 U.S.C.S. § 360aa *et seq*. and proceeded to stockpile millions of dollars worth of the drug in the event of a terrorist attack on a nuclear facility. The district and circuit courts ignored these probative facts entirely, which demonstrated that the drug idea was new to defendant and the drug product industry. Without the protection of the copyright or patent acts, inventors of useful ideas are seemingly without recourse if material facts can be ignored by courts disposing of cases under Rule 56. The question therefore is whether this Court should reassess the courts' powers under Rule 56, and specifically:

1. Whether a court may properly find that a product idea lacks "novelty" on a motion for summary judgment where material issues of fact exist as to novelty, given the fact that the FDA recognized the product idea as a newly developed drug worthy of Orphan Drug designation.

LIST OF THE PARTIES TO THIS PROCEEDING

The parties are all listed in the caption.

STATEMENT PURSUANT TO RULE 29.6

Alliance Security Products, Inc. and Alliance Security International, LLC (collectively, "Alliance"), have no parent corporations and no publicly held corporation owns 10% or more of its stock.

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Appendix A29–A41: The Orphan Drug Act, 21 U.S.C.S. § 360aa *et seq*.

PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the Second Circuit, No. 07-0526-cv, was entered on July 29, 2008 and is an unreported opinion, but can be found on Lexis at 2008 U.S. App. LEXIS 16098. It is reprinted in Appendix A to this petition. The opinion of the United States District Court for the Southern District of New York, decided January 26, 2007, is reported at 471 F. Supp. 2d 452 (S.D.N.Y. 2007) and is reprinted in Appendix A to this petition.

STATEMENT OF JURISDICTION

1. The judgment of the United States Court of Appeals for the Second Circuit ("Second Circuit") sought to be reviewed was entered on July 29, 2008.

2. The statutory provision which confers jurisdiction on the Supreme Court to review a judgment of a circuit court of appeals on a writ of certiorari is 28 U.S.C. § 1254 (1).

STATUTORY PROVISIONS INVOLVED

This case involves Rules 1 and 56 of the Federal Rules of Civil Procedure, and 21 U.S.C.S. § 360aa *et seq*. (the Orphan Drug Act). The text of Rules 1 and 56 are set forth below, and the text of the Orphan Drug Act appears in Appendix A29–A41:

Federal Rule of Civil Procedure 1.

These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81. They should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.

Federal Rule of Civil Procedure 56.

(a) By a Claiming Party. A party claiming relief may move, with or without supporting affidavits, for summary judgment on all or part of the claim. The motion may be filed at any time after:

(1) 20 days have passed from commencement of the action; or

(2) the opposing party serves a motion for summary judgment.

(b) By a Defending Party. A party against whom relief is sought may move at any time, with or without supporting affidavits, for summary judgment on all or part of the claim.

(c) Serving the Motion; Proceedings. The motion must be served at least 10 days before the day set for the hearing. An opposing party may serve opposing affidavits before the hearing day. The judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.

21 U.S.C.S. § 360aa et seq. (the Orphan Drug Act)

The text of the Orphan Drug Act appears in Appendix A29–A41.

STATEMENT OF THE CASE

Basis for Jurisdiction in the First Instance

The United States District Court for the Southern District of New York ("District Court"), pursuant to 28 U.S.C. § 1332, exercised subject matter jurisdiction over petitioners' claims because the parties were citizens of different states and the amount in controversy exceeds the sum of $75,000.

Factual Background

Petitioner Alliance, pursuant to a fully executed non-disclosure agreement between it and Respondent Fleming and Company, Pharmaceuticals ("Fleming"), revealed a new product concept developed by Alliance for the marketing, manufacturing and selling of an over-the-counter ("OTC"), liquid pediatric potassium iodide solution, in a palatable base with graduated pediatric dropper markings and child safety cap, to be approved by the United States Food and Drug Administration ("FDA") and to be used in emergency response to radiological events producing radioiodides, such as a terrorist attack or serious accident at a nuclear facility (the "Product").

Just days after Alliance's confidential presentation to Fleming, Fleming secretly took the information it learned from Alliance for its own use and developed the very same product revealed to Fleming by Alliance. The record evidence demonstrates that

prior to meeting with Alliance, Fleming never sought to develop a pediatric potassium iodide liquid solution for use as a thyroid protectant in the event of a nuclear emergency, but that after meeting with Alliance, Fleming began to covertly do so on its own while, at the same time, Fleming negotiated with Alliance to be its exclusive manufacturer of Alliance's product. Simply put, if not for Fleming's exposure to Alliance's business plan and concept for the Product, neither Fleming nor the public would have had this vital new liquid potassium iodide product.

Without affording Alliance all reasonable inferences, as it must on a motion for summary judgment, the District Court erroneously concluded that nothing in Alliance's business model for the Product, or the Product itself, was novel either to Fleming or to the public in general. The Court of Appeals for the Second Circuit affirmed the District Court's decision for the same reason of lack of novelty. However, there is no dispute that prior to Fleming's misappropriation of Alliance's Product and business model, (1) despite a market in which there were nine manufacturers selling potassium iodide products as radioiodine protectants, there was no product like the one Alliance developed on the market, (2) Fleming's own documents and public statements acknowledge that the Product was the first of its kind, and, perhaps most importantly, (3) the federal government granted Fleming Orphan Drug status for the Product. These material facts, among others, which provide support that the Product was novel, were ignored by both the District Court and the Court of Appeals.

It is unclear whether the novelty of an idea is a question of fact or a mixed question of fact and law, as courts have differed on this issue. *See, e.g., Phillips v. Avis, Inc.*, 1995 U.S. Dist. LEXIS 9735, No. 95 C 1566, 1995 WL 417587, at *2 (N.D. Ill. July 13, 1995) (holding that determination of whether a trade secret is "novel" is a mixed question of fact and law); *All Pro Sports Camp, Inc. v. Walt Disney Co.*, 727 So. 2d 363, 368 (Fla. Dist. Ct. App. 1999) (holding that whether an idea is novel is a factual question); *G.D. Searle & Co. v. Philips-Miller & Assocs., Inc.*, 836 F. Supp. 520, 527 (N.D. Ill. 1993) (same). As explained below, *Nadel v. Play-By-Play Toys & Novelties, Inc.*, 208 F.3d 368, 378 (2d Cir. 2000) seems to indicate that the question of whether an idea is sufficiently novel to be protected is indeed a factual determination, and while a court can grant summary judgment in those cases where no reasonable finder of fact could find novelty, a court must not do so if material facts underlying the issue of novelty are in dispute. *Nadel*, 208 F.3d at 380. In reaching their conclusion that Alliance's Product was not sufficiently novel, the district and circuit courts misapplied the summary judgment standard set forth in the trilogy of *Celotex Corp. v. Catrett*, 477 US 317 (1986), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), and *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), and abused Federal Rule of Civil Procedure 56 by failing to consider material facts which raise a triable issue as to novelty based on the test for novelty set forth in *Nadel*.

Indeed, just days after Alliance's presentation, Fleming, which had been in existence for decades and had never marketed potassium iodide other than

as a mucolytic agent sold in bulk containers to pharmacies and hospitals, secretly took the information it learned from Alliance for its own use and developed the very same product developed and revealed to Fleming by Alliance. The record of evidence demonstrates that Fleming took Alliance's valuable idea for the Product, submitted an Abbreviated New Drug application to the Food and Drug Administration, and received an Orphan Drug Designation for the product pursuant to 21 U.S.C. § 360cc(a), signaling that even the federal government believed the product to be novel. Simply put, if not for Fleming's exposure to Alliance's Business Plan and concept for the Product, neither Fleming nor the public would have had this new and important liquid potassium iodide product which protects the nation's children from terrorist attacks on nuclear facilities.

Prior to the solution Alliance offered, the market was bereft of child-friendly products that could block thyroid radiation exposure in children, the most susceptible population to this risk. Prior to Alliance's Product (put into commerce by Fleming), the FDA guidelines for administering potassium iodide to children or others who could not swallow a pill were to apportion a 65 mg or 130 mg potassium iodide tablet to a certain size depending on the child's age, grind the tablet in a bowl, add water and flavoring to mask the unpleasant taste, and refrigerate the mixture, which could last for only seven days. *See* Home Preparation Procedure for Emergency Administration of Potassium Iodide Tablets to Infants and Children Using 130 Milligram (mg) Tablets, http://www.fda.gov/cder/drugprepare/kiprep130mg.htm (last visited October 23, 2008).

Alliance's pediatric physician saw the impracticality of the FDA recommendation, and via its market research, Alliance discovered that many consumers were concerned about the FDA's recommendation for administering potassium iodide to children. For example, apportioning the tablet for correct dosing before crushing the pill in the midst of a nuclear emergency would be very difficult. In addition, Alliance's consumer studies showed concerns about the potency and stability of home mixtures, the taste and the impracticality of administering potassium iodide to children in daycare facilities or schools. These points were shared with Fleming during the confidential presentation.

Procedural Background

Petitioners in this case asserted claims for breach of contract, misappropriation of idea, unfair competition, accounting, conversion, breach of implied in fact contract/unjust enrichment and misappropriation of trade secret, all under New York state law. All causes of action were based upon Fleming's unauthorized use of market research, a business model and a new product concept developed by Alliance for the marketing, manufacturing and selling of an over-the-counter ("OTC"), liquid pediatric potassium iodide solution, in a palatable base with graduated pediatric dropper markings and child safety cap, to be approved by the United States Food and Drug Administration ("FDA") and to be used in emergency response to radiological events producing radioiodides, such as a terrorist attack on a nuclear facility (the "Product").

Fleming moved for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. The District Court granted Fleming's motion in its entirety, dismissing Alliance's complaint. Specifically, the District Court found that the Product was not sufficiently novel to receive protection.

By Notice of Appeal timely filed on February 13, 2007, pursuant to Federal Rule of Appellate Procedure 4(a)(1), Alliance appealed from the final judgment of the District Court. The Second Circuit had appellate jurisdiction over the appeal pursuant to 28 U.S.C. § 1291, as an appeal as of right from a final judgment of a United States district court. The Second Circuit rendered a decision on July 29 2008 and affirmed the District Court's decision.

REASONS FOR GRANTING THE PETITION

I. THE DECISION INHIBITS THE CREATION OF USEFUL PRODUCTS BY ALLOWING GRANTS OF SUMMARY JUDGMENT WHERE MATERIAL ISSUES OF FACT EXIST AS TO WHETHER AN IDEA IS NOVEL.

The Second Circuit affirmed summary judgment against petitioner despite its determination that it was likely that it was Fleming's meeting with Alliance "that opened Fleming's eyes to the possibilities of the strategy it had put on hold." (App. A6).

In the Second Circuit, *Nadel v. Play-By-Play Toys & Novelties, Inc.*, 208 F.3d 368 (2d Cir. 2000), concluded that novelty of a concept depends on several factors, including: "the idea's specificity or generality (is it a generic concept or one of specific application?), its commonality (how many people know of this idea?), its uniqueness (how different is this idea from generally known ideas?), and its commercial availability (how widespread is the idea's use in the industry?)" *Id.* at 378. Importantly, the *Nadel* Court left open the idea that it would be legally permissible to conclude that an idea was novel based on the combination of existing elements. Indeed, in *Victor G. Reiling Assocs. & Design Innovation, Inc. v. Fisher-Price, Inc.*, 450 F. Supp. 2d 175, 180 (D. Conn., 2006), a case relied upon by the District Court in this case, the district court in Connecticut aptly recognized that novelty can exist through a combination of known elements that are not themselves novel. *Victor Reiling Assocs. & Design Innovation, Inc.*, 450 F. Supp. 2d at 180.

There, the court rejected the defendant's argument — made on a motion for judgment as a matter of law following a jury trial resulting in a verdict against the defendant on misappropriation and unfair competition claims — that a combination of non-novel elements, even if never before found together in the same product, can never be novel. *Id.* at 180-81. Relying on *Nadel*, the court stated:

> By declining to comment on the District Court's discussion of the combination of existing elements, and remanding for consideration based on the novelty standard articulated, the Second Circuit [in *Nadel*] suggested that it would be legally permissible for the district court to conclude that such a combination was in fact novel. This comports with the purpose of the novelty requirement as described in *Nadel* — while there is no protection for that which is 'free and available to all,' an innovative idea to combine certain existing elements may be novel because that idea may not be in the public domain.

Id. at 180; *see also McGhan v. Ebersol*, 608 F. Supp. 277, 284 (S.D.N.Y. 1985) (recognizing that the fact that a plaintiff's idea embodies elements long in use does not itself negate originality or novelty).

While the concept of novelty is steeped in the common law, it should not indiscriminately derail cases from litigation track. Indeed, Professor Arthur R. Miller has noted that courts have used the concept of novelty "not because it is particularly easy to administer early in litigation, but rather because in practice it dispenses with close cases without burdening factfinders with the cumbersome task of

sifting through evidence." Arthur R. Miller, *Common Law Protection for Products of the Mind: An "Idea" Whose Time Has Come*, 119 Harv. L. Rev. 703, 730 (2006). This use, or misuse, of the concept of "novelty" has the untoward effect of causing the dismissal of meritorious idea cases without a public fact-finding hearing and a chance for the idea developer and his experts to be heard in support of the protection of the idea. Here, for instance, should not a fact-finder have the opportunity to ponder why the FDA would grant specific statutory protection to the idea were it not novel and of great value to some segment of the public?

The evidence adduced on the summary judgment motion in this case demonstrates that Alliance presented Fleming with a specific and unique concept for the Product in the Business Plan. Application of the novelty factors set forth in *Nadel* and its progeny to the facts of this case yields but one conclusion: material issues of fact exist concerning whether the Product was novel and the Business Plan contained confidential information unknown to Fleming or the public at the time.

As mentioned in the factual background, some cases have held that novelty is a question of fact. *See All Pro Sports Camp, Inc. v. Walt Disney Co.*, 727 So. 2d at 368; *G.D. Searle & Co. v. Philips-Miller & Assocs., Inc.*, 836 F. Supp. 520, 527 (N.D. Ill. 1993). Indeed, the *Nadel* court presented a factual test for the determination of when an idea is sufficiently novel to warrant protection. Following the *Nadel* test, Alliance, in opposition to Fleming's summary judgment motion, submitted evidence demonstrating that: (1) the misappropriated idea for the Product

was specific; (2) the idea for the product was unknown and unique — indeed, prior to Fleming's misappropriation of the Product, while there were nine companies in the industry manufacturing potassium iodide in pill form, none thought to manufacture or market liquid potassium iodide for children; (3) the record is replete with evidence that the idea for the product was not known to the public or to Fleming; and (4) prior to Fleming's misappropriation, the Product was not commercially available. *Nadel,* 208 F.3d at 378. Perhaps the best example of the Product's lack of commercial availability prior to Fleming's misappropriation of the same is the FDA's award of Orphan Drug Status[1] to the Product. The evidence even demonstrated that Fleming's application for the status recognized the current unavailability of a potassium iodide formulation that is ready to dose young children, which represents a serious obstacle to proper patient care. Without the valuable idea Alliance shared with Fleming as part of a contractual arrangement, the young citizenry of this country would have had no reasonable way to obtain an antidote for radioactive iodine exposure, and the only reason they have that protection today is because of the Alliance idea that was stolen by Fleming.

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[1] The Orphan Drug Act was enacted in order to provide drug manufacturers with incentives to develop drugs for the treatment of rare diseases or disorders that affect only small patient populations. In pursuit of this objective, Congress offered research assistance, grants, and tax incentives to companies that undertake development of orphan drugs. In addition, Congress provided for seven years of market exclusivity for approved orphan drugs. *See* Appendix A29–A41.

II. THIS CASE PRESENTS A PRIME VEHICLE FOR THE 1986 SUMMARY JUDGMENT TRILOGY OF CASES TO BE RE-EXAMINED AND REFINED.

One of the persistent issues confronting District and Circuit courts is where to draw the line in summary judgment cases where there are mixed questions of law and fact. Since 1986, this line has become increasingly blurred. As Professor Arthur R. Miller astutely observes in his article *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Cliches Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U.L. REV. 982 (2003), the Supreme Court 'trilogy' of *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, *Anderson v. Liberty Lobby, Inc.*, and *Celotex Corp. v. Catrett* "transformed summary judgment from an infrequently granted procedural device to a powerful tool for the early resolution of litigation." *Id.* at 984. "Since then, federal courts have employed summary judgment . . . in cases that before the trilogy would have proceeded to trial . . ." *Id.*

Judges and legal scholars alike have recognized the need for a reassessment of the federal summary judgment standard. *See, e.g., Sanofi-Aventis U.S. LLC v. Sandoz, Inc.*, 07-cv-02762, 2008 U.S. Dist. LEXIS 47189, at *13 (D.N.J. June 12, 2008) ("'[O]veruse' of summary judgment can prejudice the litigant who has limited resources to pursue its claim or defense."); Suja A. Thomas, *The Unconstitutionality of Summary Judgment: A Status Report*, 93 Iowa L. Rev. 1613 (2008); John Bronsteen, *Against Summary Judgment*, 75 Geo. Wash. L. Rev.

522, 531 (2007) ("The dominant theme of civil procedure scholarship over the past twenty-five years has been how rare trials have become."); Miller, 78 N.Y.U.L. REV. at 1064 ("Some courts in the post-trilogy years appear to have encroached on the factfinder's role in deciding Rule 56 motions."). For example, in *United States v. Luisi*, No. 99-10218, 2008 U.S. Dist. LEXIS 56145 (D. Mass. July 25, 2008), the Massachusetts district court states that "statistics suggest that district courts and appellate courts fail to afford jury verdicts the proper degree of deference and that many trial courts simply overuse summary judgment." *See id.* at *33. Indeed, that court observed last year that since the trilogy, federal courts "overuse summary judgment as a case management tool." *In re One Star Class Sloop Sailboat*, 517 F. Supp. 2d 546, 555 (D. Mass. 2007). The Court quotes Judge Richard S. Arnold, stating that he "cuts directly to the bone" in the following comment:

> I think in the 20 years since I was a district court judge, we've seen a tremendous increase in volume, tremendous pressure to decide cases without thinking very much about them, tremendous pressure to avoid deciding cases. I mean, some judges will do almost anything to avoid deciding a case on the merits and find some procedural reason to get rid of it, coerce the parties into settling or whatever it might be.

Id. at 555 (quoting Judge Richard S. Arnold, *Mr. Justice Brennan and the Little Case*, 32 LOY. L.A. L. REV. 663, 670 (1999). *See also, e.g., Doe v. Abington Friends School*, 480 F.3d 252, 258 (3d Cir. 2007) ("Since the Supreme Court removed the [summary]

judgment procedure from disfavored status in the 1980s, some have opined that the pendulum has swung too far in the opposite direction."); Patricia M. Wald, *Summary Judgment at Sixty*, 76 TEX. L. REV. 1897 (1998). In her article, Judge Wald points out that:

> In calendar year 1996, the civil docket in the District Court for the District of Columbia indicated that forty-two percent of terminations were by dismissal; nineteen percent were settled before trial (none during trial); three percent were terminated by trial; twenty-two percent were terminated by summary judgment; and seven percent were transferred to other courts. In the first three quarters of 1997, the rate for summary judgments stayed at twenty-two percent. These District of Columbia statistics bear out the generalized prediction that we are approaching a time when a civil trial will be thought of as a 'pathological event.' And despite the high profile that 'alternative dispute resolution' has enjoyed in the past decade and a half, summary judgment may in fact be the more commonly used mode of disposition on the merits, outnumbering settlement by court-annexed arbitration, mediation, early neutral evaluation, and other settlement techniques.

Id. at 1915. In sum, the lengthy discourse on the overuse of summary judgment standard following the *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, *Anderson v. Liberty Lobby, Inc.*, and *Celotex Corp. v. Catrett* trilogy gives ample support to Petitioner's belief that the Rule 56 standard is ripe for reevaluation.

Alliance is one of the unfortunate casualties of the lack of clarity inherent in the trilogy formulation, because this Court's mandate to only grant summary judgment where there is "no genuine issue of material fact" was not followed. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). If one believes that "novelty" is an issue of fact and law, and it would appear that this is what the *Nadel* case and the others cited at pages 5-6, *supra*, hold, it is clear that the courts below crossed the line and impinged on the prerogatives of a jury in dismissing this case without a trial.

The record below contains abundant — and material — evidence that would support a finding under the factors set forth in *Nadel* that the Product was novel to the public as well as novel to Fleming.[2] The evidence would have allowed a reasonable fact-finder to conclude that Alliance's Product was worthy of protection by the courts and unlawfully misappropriated by Fleming.

The evidence features the plain and unarguable fact that the federal government saw fit to award the product Orphan Drug status: this in and of itself should have been sufficient to create a genuine issue of fact as to novelty. However, also included in the record was probative and largely undisputed evidence that:

(1) Fleming had been in existence for decades but did not create the product at issue until immediately after it met with Alliance;

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[2] The Joint Appendix filed below fills six volumes that are replete with affidavits, documents and deposition testimony establishing the facts that are described in this Petition.

(2) when Alliance's CEO discussed the concept for the Product with Fleming, Fleming repeatedly told him that it did not see a need for the Product, and asserted that it did not believe that the United States government would even admit that a real threat of nuclear attack existed, and therefore would not willing to invest in the Product;

(3) once Alliance convinced Fleming of the market for the Product and prior to Fleming's misappropriation, the parties exchanged numerous telephone calls, emails and drafts of agreements for an exclusive distribution agreement and, ultimately, the parties reached agreement on all key business terms, except for pricing, but left open further negotiations;

(4) there was no FDA-approved potassium iodide pediatric liquid solution on the market prior to the development of the Alliance idea for the product, despite the existence of nine potassium iodide pill manufacturers that were competing for sales in the United States and worldwide.[3]

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[3] As mentioned by Professor Miller, *Anderson v. Liberty Lobby* explained that the Rule 56 standard was to mirror the governing rule under Rule 50(a) for a directed verdict which requires a trial judge to "direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict." *See* Miller, 78 N.Y.U.L. REV. at 1036-37 (quoting *Anderson v. Liberty Lobby*, 477 U.S. at 250.). The recited facts would readily pass muster to support a verdict in favor of Alliance on the novelty issue yet this case was dismissed perhaps in part because this standard lacks clarity.

In short, what the courts below require is guidance from the Court regarding where the summary judgment line is to be drawn in cases of mixed law and fact, a line that was not addressed in the trilogy and that continues to perplex practitioners and courts with regularity.

The harm resulting from allowing this line to remain indistinct is that meritorious cases like that brought by Alliance will continue to be dismissed. The harm to this country due to the lack of protection of worthy ideas is immeasurable. It cannot be ascertained how many cases of a similar nature have never been brought or reported in the law reports. Conceivers of ideas are afraid to make worthwhile disclosures, even under the umbrella of a non-disclosure agreement as was the case here, because they cannot trust that their ideas will receive protection from the courts.

A review of the Rule 56(c) summary judgment standard, and in particular how (and if) courts should decide the mixed fact and law question of novelty in idea cases is the opportunity presented by this Petition. Without specific guidance resolving the uncertainty that is extant with respect to the protection of new ideas, our society risks losing valuable contributions from idea developers who are fearful that their creations will not be protected. Given the current state of affairs, one would not expect our children to have the benefit of stockpiles of palatable liquid potassium iodide in the event of a nuclear catastrophe. We submit that this uncertainty should be rectified.

CONCLUSION

Petitioners respectfully request that this Court grant this petition for certiorari to review the question that would be presented on this appeal.

Dated: October 27, 2008

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